STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
JOHN E. SAVIANO, JR.	)	
	)	
VS.	)	W.C.C. 00-06761
	)	
COMMERCIAL TRUCK SERVICE, INC.	)	

DECISION OF THE APPELLATE DIVISION

ROTONDI, J. This matter was heard before the Appellate Division upon the petitioner/employee's appeal from the decision and decree of the trial court entered on May 16, 2002. This matter was heard as an employee's Original Petition seeking workers' compensation benefits for an alleged back injury sustained on July 17, 2000. The alleged date of injury was subsequently amended to July 5, 2000. The petition seeks total disability benefits from July 18, 2000 to present and continuing. A pretrial order was entered in this matter finding that the employee did not suffer a work-related injury and from that pretrial order a timely claim for trial was filed by the employee's counsel. There was also a TDI lien on record.

At trial, the trial judge denied and dismissed the employee's petition, finding that the employee had failed to prove by a fair preponderance of the credible evidence that he suffered an injury on July 17, 2000 during the course of

his employment. From that decision and decree, the employee's instant appeal followed.

The employee is a right hand dominant diesel mechanic. He was in the employ of Commercial Truck Service Company as a diesel mechanic commencing in July 2000 and was employed as such on the day of the alleged injury. Prior to being employed by Commercial Truck Service Company, Mr. Saviano was a self-employed motorcycle mechanic for approximately nineteen (19) years and also intermittently drove a tractor trailer truck.

At trial, Mr. Saviano testified that as a diesel mechanic at Commercial Truck Service Company his duties included periodic maintenance services such as oil changes, lubrication of the chassis and other friction points, and brake replacements and adjustments. The employee stated that on July 17, 2000, he was assisting a fellow employee, Kevin Marcotte, in removing and refurbishing the main piston on a shop-owned fork truck. Mr. Saviano further testified that the supervisor, Johnny "Doc" Sylvia, and the company owner, Oliver "Buster" Moran, separately observed Mr. Saviano and Mr. Marcotte removing the piston on the fork lift and offered ideas on how to proceed with the project.

According to Mr. Saviano's testimony, after removing the eighty (80) to one hundred (100) pound piston approximately ninety-eight percent (98%) of completion, he experienced severe back pain that extended to his stomach, right shoulder, and right side of his neck while supporting the piston.

On cross-examination, the employee acknowledged that he sustained a prior injury to his back in October of 1999 "around Halloween." The employee asserted that he reported the October 1999 back injury to his employer and remained out of work from October of 1999 to February of 2000 because of said injury. During that time, the employee collected Temporary Disability Insurance benefits (TDI).

The trial included the live courtroom testimony of Mr. Saviano's fellow employees, Kevin Marcotte, John Sylvia, Oliver Moran, as well as that of Dr. Thomas McGunigal. The court reviewed Dr. McGunigal's written reports regarding treatment of the employee. In addition, the depositions and corresponding reports of Drs. Vincent I. MacAndrew, Jr., David J. Cicerchia, and Philo F. Willetts, Jr. were reviewed by the trial judge. Dr. MacAndrew was appointed by the court to conduct an impartial medical examination of the employee. The employer submitted the affidavit and report from Dr. A. Louis Mariorenzi. After a thorough review of the medical evidence presented by the employee and the employer, including the independent medical review of Dr. MacAndrew, the trial judge found that the employee failed to prove by a fair preponderance of the credible evidence that he suffered an injury on July 17, 2000 during the course of his employment. The trial judge then ordered that the employee's petition be denied and dismissed.

The employee filed the following as his Reasons of Appeal from the decision and decree entered by the trial judge on May 16, 2002:

"1. The Decree is against the law.

"2. The Decree is against the evidence.

"3. The Decree is against the law and the evidence and the weight and sufficiency thereof because there are no facts or evidence to establish any other cause of Petitioner's injuries apart from his work related activities.

"4. The Decree is against the law and the evidence because the facts and history of Petitioner's injuries established that his neck, shoulder and back injuries were caused by his work activities.

"5. The Decree is against the law and the evidence because the trial judge misconceived or overlooked the competent medical evidence which established that Petitioner's neck, shoulder and back injuries were caused by his work activities.

"6. The Decree is against the law and the evidence because the testimony of Petitioner's coworker established that the employee sustained an injury to his neck, shoulder and back while at work and that he sought medical treatment for said injuries.

"7. The Decree is against the law and the evidence because the trial judge misconceived or overlooked the competent medical evidence which established that Petitioner's (sic) is totally disabled from work as a result of his neck, shoulder and back injuries."

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. § 28-35-28(b)); Grimes Box Co. v Miguel, 509 A.2d 1002 (R.I. 1986)). Such review, however, is limited to the record made before the trial judge. Vaz, supra (citing Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982)).

Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding. For the reasons set forth, we find that the trial judge was not clearly erroneous and therefore, find no merit in the employee's appeal. We, therefore, affirm the trial judge's decision and decree.

The Rhode Island Supreme Court has long held that the Workers' Compensation Court Appellate Division may decide only those questions of law properly raised on appeal. Bissonnette v. Federal Dairy Co., 472 A.2d 1223, 1226 (R.I. 1984); Lamont v. Aetna Bridge Co., 107 R.I. 686, 690, 270 A.2d 515, 518 (1970). The Rhode Island Supreme Court has frequently stated that the Workers' Compensation Court Appellate Division, "generally may not consider an issue unless the issue is properly raised on appeal by the party seeking review." State v. Hurley, 490 A.2d 979, 981 (R.I. 1985).

In order for issues to be properly before the appellate division, the statutory requirements of R.I.G.L. § 28-35-28 must be satisfied. The pertinent language of R.I.G.L. § 28-35-28 mandates, ". . . the appellant shall file with the administrator of the court reasons of appeal stating specifically all matters determined adversely to him or her which he or she desires to appeal, ..." This tribunal is without authority to consider reasons of appeal that fail to meet the statutorily required level of specificity. Bissonnette, 472 A.2d 1223 (R.I. 1984). General recitations that a trial judges' decree was against the law and the evidence fail to meet the specificity requirements of R.I.G.L. § 28-35-28. Falvey, 584 A.2d 417 (R.I. 1991).

Under the aforementioned binding authority, the employee's first two (2) Reasons of Appeal both fail to meet the required standard of specificity. Accordingly, we deny and dismiss these Reasons of Appeal.

The employee's third Reason of Appeal asserts that the denial of his claim was wrong because there was no evidence to establish any other cause of his injuries apart from his work-related activities. The employee, or more accurately, the employee's counsel, is arguing that the trial judge had to accept as fact that the employee sustained a work-related injury due to the lack of any facts or evidence to prove otherwise. In essence, the employee's counsel is arguing that an absence of evidence demonstrating that an employee did not sustain a work-related injury in the course of his or her employment requires the court to accept all allegations and claims for benefits made in a workers' compensation petition. This would produce an absurd result contrary to the established burden of proof requirements of Rhode Island's Workers' Compensation Law.

It is well settled that the employee bears the burden of producing credible evidence of a probative force to support his or her petition for workers' compensation benefits. Delage v. Imperial Knife Co., Inc., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979). More precisely, "The employee bears the burden of proving allegations contained in the petition for compensation by a fair preponderance of credible evidence." Blecha v. Wells Fargo Guard-Co. Serv., 610 A.2d 98, 102 (R.I. 1992), *citing* Mastronardi v. Zayre Corp., 120 R.I. 859, 862-63, 391 A.2d 112, 115 (1978).

Further, the employee also bears the burden of establishing by a fair preponderance of the credible evidence that his or her injury arose out of and in the course of his or her employment. "It is settled law in this jurisdiction that an employee's injury is compensable if the particular facts of a case establish a causal connection or nexus between the injury and employment." Maggiacomo v. R.I. Transit Authority, 508 A.2d 402, 403 (R.I. 1986); *citing,* Dawson v. A & H Mfg. Co., 463 A.2d 519 (R.I.1983); DeNardo v. Fairmount Foundries Cranston, Inc., 121 R.I. 440, 399 A.2d 1229 (1979); Beauchesne v. David London & Co., 118 R.I. 651, 375 A.2d 920 (1977). "To establish such a nexus or causal relationship, the employee must prove that his injury occurred within the period of his employment, at a place where he might reasonably have been, and while either fulfilling the duties of his employment or doing something incidental thereto or to the conditions under which those duties were to be performed." Maggiacomo, 508 A.2d at 403 *citing,* Bottomley v. Kaiser Aluminum & Chemical Corp., 441 A.2d 553, 554 (R.I.1982). The petitioner has the burden of proving that there is a causal connection between the injury sustained and his or her employment and not merely a possible consequence. Natale v. Frito-Lay, Inc., 119 R.I. 713, 717, 382 A.2d 1313, 1315 (1978).

In the instant petition, the employee's third Reason of Appeal must fail because it is dramatically inconsistent with the above-cited burden of proof doctrines. If the Appellate Division were to accept the employee's position as stated in this reason of appeal, this tribunal would be departing from the well-

settled burden of proof requirements for petitioners filing claims under the Rhode Island Workers' Compensation Act. We are unable and unwilling to so hold. The employee in the instant petition, along with all other petitioners in other matters, must satisfy the required burden of proof according to the well-settled case law.

Mr. Saviano cannot demonstrate that he did sustain a compensable injury in the course of his employment merely by relying on the absence of facts or evidence to the contrary. The petitioner must prove affirmatively that he or she, in fact, sustained a compensable injury in the course of his or her employment. It is not reasonable or legally sound for the Appellate Division to accept the employee's third reason of appeal and it therefore, must fail.[1]

There is a common element to the employee's remaining Reasons of Appeal and consequently we will analyze them collectively. The common element to all of the remaining reasons of appeal is the question of the trial judge's evaluation of the evidence presented. In the instant petition, the trial judge reviewed all of the evidence submitted by the employee and employer. After a thorough review of all of the submitted evidence, the trial judge was ". . . not persuaded by the evidence presented that the incident that occurred at work

[1] This tribunal need not consider the veracity of the employee's claim that there is a lack of facts or evidence to establish any other cause of the employee's injuries; a proposition the employer and/or its insurance carrier would dispute. Because reason of appeal number three (3) is an improper proposition, it fails without the need for the Appellate Division to consider the truthfulness of the allegation(s) contained within it. The employee cannot satisfy his burden of proof according to well-settled standards, with his proposed burden of proof analysis. Therefore, the employee's reason of appeal is rejected without further consideration other than what has already been explained.

while removing a piston from a forklift is the cause of the employee's disability." (Tr. decision, p. 18)

It has long been held that the trial judge's scope of authority encompasses the ability to reject a witness' testimony on credibility grounds so long as a reason is stated for rejecting such testimony. Jackowitz v. Deslauriers, 91 R.I. 269, 162 A.2d 528 (1960). "Rejection on credibility grounds may not, however, be arbitrary or capricious, nor may it ". . . be left to the whim of a trier of fact." Michaud v. Michaud, 98 R.I. 95, 99, 200 A.2d 6, 8 (1964). "Moreover, a trier of fact who disregards a witness's positive testimony because in his judgment it lacks credibility should clearly state, even though briefly, the reasons which underlie his rejection." Laganiere v. Bonte Spinning Co., 103 R.I. 191, 195, 236 A.2d 256, 258 (emphasis added).

The trial judge is uniquely qualified to both assess the credibility of a witness and to determine what evidence to accept and what evidence to reject because he or she is in the best position to observe the appearance of a witness, his or her demeanor, and the manner in which he or she answers the questions. Davol, Inc. v. Aguiar, 463 A.2d 170, 174 (R.I. 1983). In addition, the testimony presented in a workers' compensation hearing is always subject to evaluation by the trial judge who may reject some or all of a witness's testimony as being unworthy of belief. Delage v. Imperial Knife Co., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979).

In the instant petition, the trial judge was not persuaded by the evidence presented by the employee that the incident that occurred at work while removing a piston from a forklift was the cause of the employee's disability. (Tr. decision, p. 18) In so holding, the trial court cited the employee's giving of a variety of histories to the numerous doctors that treated him as being problematic as to the accuracy and reliability of the medical evidence in the employee's attempt to establish his claim that he sustained a compensable work-related injury on July 17, 2000.

> "What concerns the Court is that following the incident with the piston the employee did not report this incident to the doctors that treated him in the weeks and months following this incident." (Tr. decision p. 19)
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> "The medical evidence presented to the Court indicates that the first treatment that the employee had for his back was at the East Providence Emergency Room. The employee did not report the July 2000 incident to his medical provider at the emergency room on July 25, 2000. He treated with Dr. Akhtar on July 28, 2000, and he did not report this incident to him. The employee was referred to Dr. Mariorenzi and saw him on August 17, 2000. He did not report an injury in July 2000." (Tr. decision, p. 20)
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> "The employee then began treating with Dr. Cicerchia. He first saw Dr. Cicerchia on September 5, 2000, and did not provide him with a history of an incident at work in July 2000. He initially told the doctor he injured his back and neck in May, June 2000, but later told the doctor that he believed his back and neck pain is the result of an October 1999 injury." (Tr. decision, p. 20)

The court was unable to rely upon the impartial medical examination performed by Dr. MacAndrew due to the concerns about the medical history provided by the employee to Dr. MacAndrew.

In addition, the trial judge specifically referred to Dr. Willetts' deposition testimony in which Dr. Willetts stated that the employee's complaints of spinal pain were not supported by objective findings. (Tr. decision, p. 22) The court specifically relied upon Dr. Willett's statements that Mr. Saviano made derogatory comments about the physicians that did not support his litigation and Dr. Willetts characterization of Mr. Saviano as a "very manipulative person." (Tr. decision, p. 22; Res. Exh. D, p. 12)

The trial judge also preferred to believe the testimony of the employer over that of the employee and thereby rejected the employee's testimony and the allegations contained therein. The court stated,

> "He also never reported this injury and disability to his employer. The Court <u>believes the testimony of the employee's supervisors and coworkers</u> that they had no knowledge in October 1999 or in July 2000 that the employee had suffered a disabling back injury." (emphasis added) (Tr. decision, p. 19)

The trial judge possessed the authority and discretion to accept one witness's testimony over the testimony of another witness. Further, the trial judge questioned the employee's credibility due to the lack of clarity in his testimony as related to the history of his back pain and the date of his injury. The trial judge was concerned with the employee's testimony that he was injured on July 17, 2000 and spent the next three (3) days out of work. The court cited

time cards that were presented by the employer that contradicted the employee's testimony by showing the employee worked on July 18, 2000 for 2.91 hours, July 19, 2000 for 8.08 hours, July 20, 2000 for 8.29 hours, and July 21, 2000 for 6.7 hours. "The Court believes that these time cards accurately reflect the hours that the employee worked." (Tr. decision, p. 19) Again, the trial judge rejected the employee's testimony and credibility and specifically stated the reasons for the rejection. The trial judge possessed the authority and discretion to do so under the aforementioned authority and her determination can hardly be classified as either arbitrary or capricious. In so holding, the court relied upon competent evidence in reaching its decision and we cannot conclude that she was clearly erroneous.

The court also noted that the issue of the cause of the employee's disability was complicated by the fact that the he had sustained a back injury in October 1999 for which he was out of work from October 1999 until February 2000. (Tr. decision, p. 19) The trial judge pointed out that the employee had reported to some of his treating doctors that he felt the October 1999 injury was the cause of his back problems. This provided further support for the determination that the employee failed to prove that his incapacity was causally related to an injury sustained in the course of his employment with Commercial Truck Service in July 2000. (Id. at 19-20)

After thoroughly reviewing the entire record, the trial judge relied upon all of the competent evidence in finding that the employee failed to prove by a fair

preponderance that he sustained an injury on July 17, 2000 during the course of his employment. The trial judge cited specifically which evidence she relied upon in making her decision and which evidence she rejected as incredulous for specific reasons.

As such, this tribunal is unable to find that the findings of fact made by the trial judge were clearly erroneous. Therefore, for the foregoing reasons, the Employee's Reasons of Appeal in their entirety are denied and dismissed and the decree appealed from is hereby affirmed.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Healy and Bertness, JJ. concur.

ENTER:

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Rotondi, J.

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Healy, J.

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Bertness, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOHN E. SAVIANO, JR.)
)
VS.) W.C.C. 00-06761
)
COMMERCIAL TRUCK)
SERVICE, INC.

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on May 16, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

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ENTER:

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Rotondi, J.

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Healy, J.

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Bertness, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq. and Paul V. Mancini, Esq. on

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